Supreme Court, U. S.
FILED
OCT 31 1972

No. 71-1081

In the

Supreme Court of the United States

OCTOBER TERM, 1971

KEARNEY & TRECKER CORPORATION,
Petitioner,

vs.

GIDDINGS & LEWIS, INC.,
Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

EDWARD A. HAIGHT
Suite 2820
141 W. Jackson Boulevard
Chicago, Illinois 60604
Attorney for Petitioner

Of Counsel:
LESTER S. CLEMONS
THOMAS W. EHRMANN
780 North Water Street
Milwaukee, Wisconsin 53202

The Scheffer Press, Inc.—(312) 263-6850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1081

KEARNEY & TRECKER CORPORATION,

Petitioner,

vs.

GIDDINGS & LEWIS, INC.,

Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

As to the first question presented, Respondent (p. 11) answers by simply denying that any conflict in principle exists between the decision below and decisions of other courts of appeal as to the doctrine of *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965). Respondent (pp. 8-10) first catalogues the circumstances alleged to have formed the basis of the Court of Appeals determination.* Then, Respondent (pp. 11-13) argues unclean hands and relies upon *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238 (1944) and *Keystone Driller Co.* v. *Excavator Co.*, 290 U.S. 240 (1933), each of which dealt with unclean hands

---

*The majority of the enumerated circumstances are not mentioned in the opinion.

as a defense to a patent infringement action. In so arguing, Respondent equates an equitable defense with a showing required for affirmative relief for violation of Section 2 of the Sherman Act. But for a Sherman Act violation there must be materiality, the wrongful conduct must have been instrumental in procuring the patent.

In its Petition, Petitioner has pointed out the care with which this court limited its holding in *Walker* and the recognition by other Courts of Appeals of the limited nature of that holding. There can be no question that under *Walker* the issuance of the patent must have been obtained or procured by the improper conduct. That necessary element for violation of Section 2 of the Sherman Act is absent in this case, as the undisturbed finding of lack of materiality made by the trial court demonstrates.

As to the third question presented, the Respondent (pp. 17-19) restates the question to be whether a reviewing court can consider documentary evidence and dispose of an appeal on its merits. Four decisions are cited to show that a reviewing court can do so. In each of those decisions, the reviewing court was considering matters in evidence and considered by the trial court. In each instance, the opposing party had an opportunity to offer counter evidence. The error here urged is in making a determination of liability by consideration of documents excluded from evidence, not considered by the trial court, and as to which Petitioner had no opportunity to offer evidence to rebut or explain.

The Respondent (p. 18) would minimize the significance of the documents as to which Petitioner has had no opportunity to respond as being merely "cumulative and corroborative" of other evidence. They were more than that and were referred to repeatedly by the Court of Appeals (App. 41a, 42a, 54a).

The subsequent decision in the litigation of *Collins v. Hoffman*, reported at 74 Wash. 264; 133 Pac. 450 (1913), referred to by Respondent (p. 18) emphasizes the proper procedure for handling of documents found on review to have been erroneously excluded from evidence. The party against whom the documents were offered is to be given the opportunity on remand to explain or rebut such documents. Whether he is subsequently successful in explaining or rebutting the documents is not relevant; he was given the opportunity to try. Petitioner under the decision below has been denied that opportunity.

Respondent (p. 19) refers to the fact that the Court of Appeals remanded the case to the District Court for additional proceedings. Those proceedings were to determine whether Respondent has been injured by the Sherman Act violation found by the Court of Appeals (App. 63a-64a). They will afford Petitioner no opportunity to rebut or explain on matters already determined by the Court of Appeals.

Respectfully submitted,

EDWARD A. HAIGHT
Suite 2820
141 W. Jackson Boulevard
Chicago, Illinois 60604
Attorney for Petitioner

Of Counsel:

LESTER S. CLEMONS
THOMAS W. EHRMANN
780 North Water Street
Milwaukee, Wisconsin 53202